

2011 WL 7404094 (Mich.) (Appellate Brief)  
Supreme Court of Michigan.

In re Estate of Arnold E. MORTIMORE, Deceased Helen M. Fiser, Respondent-Appellant,

v.

Renee HANNEMAN and Dean Mortimore, Petitioners-Appellees.

No. 143307.

December 21, 2011.

Appeal from the Court of Appeals

Court of Appeals No. 297280

Shiawassee County Probate Court No. 09-034102-DA

Oral Argument Requested

December 21, 2011

**Brief On Appeal - Appellant**

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**\*ii TABLE OF CONTENTS**

INDEX OF AUTHORITIES...	iv
BASIS OF JURISDICTION AND RELIEF REQUESTED .....	vi
QUESTION INVOLVED .....	vii
INTRODUCTION .....	1
STATEMENT OF FACTS .....	3
ARGUMENT .....	6
I. THE ORIGIN AND DEVELOPMENT OF THE DOCTRINE OF UNDUE INFLUENCE UNDER MICHIGAN LAW .....	7
A. A donative transfer is procured by undue influence if the wrongdoer exerted such influence over the donor that it overcame the donor's free will and caused the donor to make a donative transfer that the donor would not otherwise have made... ..	7
B. The doctrine of undue influence is intended to effectuate the donor's "true" intent and to protect susceptible individuals from improper influence that impels the donor to act against his or her inclination and free will .....	8
C. The origin of the doctrine of undue influence and the presumption of undue influence .....	9
II. MICHIGAN'S CURRENT DOCTRINE OF UNDUE INFLUENCE AND THE ELEMENTS OF THE PRESUMPTION OF UNDUE INFLUENCE .....	12
A. Michigan's Current Doctrine of Undue Influence. ....	12
B. Michigan's Elements of the Presumption of Undue Influence .....	14
1. What constitutes a "confidential or fiduciary relationship?" .....	14
2. What constitutes "benefit" from the donative transfer? .....	16
3. What constitutes "opportunity" to influence the donor? .....	16
4. It is relatively easy to establish the presumption of undue influence under Michigan law .....	18
III. THE EFFECT OF THE PRESUMPTION OF UNDUE INFLUENCE IS TO SHIFT TO THE PROPONENT THE BURDEN OF GOING FORWARD WITH THE EVIDENCE .....	19
*iii IV. THE QUANTUM OF EVIDENCE NECESSARY TO REBUT A PRESUMPTION OF UNDUE INFLUENCE IS "SUBSTANTIAL EVIDENCE." .....	21

CONCLUSION .....	23
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#### \*iv INDEX OF AUTHORITIES

##### Cases

<i>Bradford v Vinton</i> , 59 Mich 139, 153; 26 NW 401 (1886) .....	10
<i>Donovan v Bromely</i> , 113 Mich 53, 54; 71 NW 523 (1897) .....	10,11
<i>In re Cox'Estate</i> , 383 Mich 108; 174 NW2d 558 (1970). ....	16
<i>In re Estate of Karmey</i> , 468 Mich 68, 75, 658 NW2d 796 (2003) .....	15
<i>In re Estate of Lawler</i> , 2005 WL 3536417 (unpublished decision) ....	18
<i>In re Estate of Mayes</i> , 2006 WL 2380970 (unpublished decision) .....	17, 23
<i>In re Estate of Willey</i> , 9 Mich App 245, 257; 156 NW2d 631 (1967) .	14
<i>In re Estate of Wojan</i> , 126 Mich App 50, 51; 337 NW2d 308 (1983) .	13
<i>In re Kanable's Estate</i> , 47 Mich App 299; 209 NW2d 452 (1973) .....	13
<i>In re Reed's Estate</i> , 273 Mich 334, 343; 263 NW 76 (1935) .....	13
<i>In re Spillette's Estate</i> , 352 Mich 12, 18; 88 NW2d 300, 303 (1958) ..	7
<i>In re Susser Estate</i> , 254 Mich App 232, 236; 657 NW2d 147 (2002) .	23
<i>In re Wood's Estate</i> , 374 Mich 278, 298-99;132 NW2d 25 (1965) .....	9, 19, 20
<i>jozwiak v Northern Michigan Hospitals, Inc</i> , 231 Mich App 230; 586 NW2d 90 (1998) .....	22
<i>Kar v Hogan</i> , 399 Mich 529, 542; 251 NW2d 77 (1976) .....	5, 7, 12, 14
<i>Matter of Estate of Mikeska</i> , 140 Mich App 116; 362 NW2d 906 (1985) .....	13
%in re Livingston's Estate, 295 Mich 637; 295 NW 343 (1940) .....	13
<i>Shepard v Shepard</i> , 161 Mich 441, 463; 126 NW 640 (1910) .....	8
<i>Sibley v Morse</i> , 146 Mich 463; 109 NW 858 (1906) .....	11
<i>White v Bailey</i> , 10 Mich 155; 1862 WL 2478 (1862) .....	9
<i>Widmayer v Leonard</i> , 422 Mich 280; 373 NW2d 538 (1985) .....	20, 21

##### \*v Other Authorities

Carla Spivack, <i>Why the Testamentary Doctrine of Undue Influence Should Be Abolished</i> , 58 Kan L Rev 245 (2010) .....	6
Dukeminier, Sitkoff, and Lindgren, <i>Wills, Trusts, and Estates</i> (New York: Aspen Law & Business, 2009) .....	ii, iii, iv, 6
Joseph W. deFuria, Jr., <i>Testamentary Gifts Resulting from Meretricious Relationships: Undue Influence or Natural Beneficence?</i> , 64 Notre Dame L Rev 200 (1989) .....	6
Mary J. Quinn, <i>Undue Influence: Definitions and Applications</i> , (March 2010) .....	9
Melanie B. Leslie, <i>The Myth of Testamentary Freedom</i> , 28 Ariz L Rev 235 (1996) .....	6
Neil S. Hecht and William M. Pinzler, <i>Rebutting Presumptions: Order Out of Chaos</i> , 58 B.U.L. Rev 527 (1978) .....	20, 21
Restatement (Third) of Property (Wills and Other Donative Transfers) § 8.3, Comment d .....	8
Restatement (Third) of Property (Wills and Other Donative Transfers) § 8.3, Comment e .....	13,14
Restatement (Third) of Property (Wills and Other Donative Transfers) § 8.3, Comment g .....	16
Restatement (Third) of Property (Wills and Other Donative Transfers) § 8.3, Comment h .....	19

#### \*vi BASIS OF JURISDICTION AND RELIEF REQUESTED

Respondent-appellant Helen M. Fiser (“Helen Fiser”) appeals under [Michigan Court Rule 7.301\(A\)\(2\)](#) the unpublished decision of the Court of Appeals in *In re Estate of Arnold E. Mortimore, Deceased*, issued May 17, 2011 (Docket No. 297280); [2011 WL 1879737](#). In an order dated October 26, 2011, this Court granted Helen Fiser's Application for Leave to Appeal and directed the parties to address “what standards should apply and what factors a court should consider in determining whether a transaction was the product of undue influence where there is a fiduciary relationship between the parties.”

Helen Fiser asks this Court to reverse the Court of Appeals, which incorrectly determined that Helen Fiser failed to offer sufficient evidence to rebut the presumption of undue influence, and consequently incorrectly reversed the trial court's decision that Petitioner-appellees did not prove that the will of Arnold E. Mortimore was the product of undue influence. More specifically, Helen Fiser asks this Court to rule that the Court of Appeals incorrectly determined that a “preponderance of the evidence” is necessary to rebut an established presumption of undue influence, rather than the lesser quantum of “substantial evidence.”

### **\*vii QUESTION INVOLVED**

1. When a presumption of undue influence has been established by the contestant, whether the proponent's presentation of *substantial evidence* (more than a scintilla but less than a preponderance) contradicting undue influence is sufficient to rebut the presumption of undue influence?

The Court of Appeals answered: No.

The trial court answered: Yes.

Respondent-Appellant answers: Yes.

Petitioners-Appellees will answer: No.

### **\*1 INTRODUCTION**

This dispute arises from the will of Arnold E. Mortimore (“Decedent”), which Decedent executed more than one year before his death. In his will, Decedent left his entire estate to his second wife, Helen Fiser, to the dismay of his two surviving children by his first wife. Decedent's two children by his first wife filed an action in the Shiawassee County Probate Court contesting the validity of their father's will on the grounds that it was the product of undue influence by his second wife, Helen Fiser. After a three-day bench trial, during which the trial court heard from twenty-eight (28) witnesses, the trial court issued a decision and order that the contestants had not proven undue influence.

On appeal, the Court of Appeals determined that a presumption of undue influence arose and that Helen Fiser did not present sufficient evidence to rebut the presumption. Unlike the trial court, the Court of Appeals did not have the opportunity to evaluate the credibility of the witnesses. Nevertheless, the Court of Appeals rejected the trial court's weighing of the evidence against a finding of undue influence and declared that the trial court “essentially found the evidence to be equally convincing.” The Court of Appeals then incorrectly determined that Helen Fiser, as the proponent of Decedent's will, could only rebut the presumption of undue influence by disproving undue influence by a preponderance of the evidence. Based upon its characterization of the evidence as being “equally convincing,” the Court of Appeals determined that Helen Fiser failed to rebut the presumption of undue influence.

Helen Fiser asks this Court to correct the mistake of the Court of Appeals in determining that the quantum of evidence necessary to rebut a presumption of *undue influence* is a *preponderance of the evidence*. This Court should recognize its prior holdings and determine that the quantum of evidence necessary to rebut a presumption of *undue influence* is **\*2** *substantial evidence* (more than a scintilla but less than a preponderance). Accordingly, this Court should reverse the decision of the Court of Appeals and reinstate the decision of the trial court in this matter.

### **\*3 STATEMENT OF FACTS**

Decedent's Family History and Relationship With Helen Fiser

Decedent was a simple man who owned a small automobile repair business in Morrice, Michigan. (27a) He was married to his first wife, Joann Mortimore, for 53 years. (27a) The couple had three children together: Robert Mortimore,<sup>1</sup> Petitioner-Appellee Dean Mortimore, and Petitioner-Appellee Renne Hanneman. (27a) Joann Mortimore died in 2006. (25a)

Following Joann's death, Decedent reached out to his friend Helen Fiser for help with the funeral arrangements. (22a) Decedent had known Helen for nearly twenty years. They were neighbors, (21a), and first met at a town hall meeting in 1988, (21a) Decedent knew that Helen's husband of 36 years had recently died, and called Helen to ask for help with Joann's funeral arrangements. (22a)

Helen helped Decedent with the funeral arrangements, and their relationship became romantic in the months that followed. (22a-23a) They began living together, and in October 2007, Decedent asked Helen to marry him. (25a) Following a small ceremony, they were married on October 10, 2008.<sup>2</sup> (28a) When Decedent died on June 12, 2009, he left his entire estate to Helen through his will dated May 1, 2008. (Last Will of Arnold E. Mortimore - 30a-33a) Petitioner-Appellees Renne Hanneman and Dean Mortimore, objected to the probate of the will on the grounds of undue influence.

#### **\*4 Proceedings in the Probate Court**

During a three-day bench trial on the issue of undue influence, the trial court heard testimony from twenty-eight (28) witnesses. The trial court, having heard and observed the witnesses, noted the inconsistency in the testimony presented.

I look at the Respondent, Helen Fiser, she referred to herself one time as niece, one time she referred to herself as a significant other, one time she referred to herself as fiancé, one time she referred to herself as wife, one time she referred to herself as durable power of attorney, one place even with the realtor she called herself companion. I have a Will that we don't - nobody produced the drafter of it, nobody knew who the drafter was. We have a Will that omitted one child's name, Robert, and it has granddaughter spelled wrong. It had people involved that were fairly new to [Decedent's] life, being an Adam Smith and Helen's daughter. Just all things that just don't flow and make sense. We had testimony that a notary, Gayle Smith, notarized things that weren't in front of her. She said she didn't. But we still had the testimony, it was disputed. We have a minister who nobody can find, that was testified that his address didn't exist. We have-I don't know we have friends that said they were the best friend and they spent three to four hours a day, three or four times a week at [Decedent's] garage, but never saw his kids around. We've got other people from the Petitioner's side that said they would spend three or four hours there and never knew this person or never knew that person. And I mean these people just would have had to run into each other at some point in time. We have a Trust that was executed in August of 2007 and it was revoked in May of 2008. It just kind a goes on and on and on.

(10a)

In its decision, the trial court stated, "I look back and the doctor of 25 years felt that [Decedent] was able to make a decision of his own free will. We had witnesses on both sides that said he was influenced by Helen and witnesses on the other side says he was able to do what he wants and you couldn't change his free will. And it was just a decision that the Court had to come down on." (11a) The trial court then ordered and adjudged that the Petitioners-Appellees "did not prove undue influence and there is not sufficient grounds to find undue influence under any of the conditions and standards of the law." (6a)

#### **\*5 The Court of Appeals' Opinion**

Petitioners-Appellees appealed the final order of the trial court to the Court of Appeals. The Court of Appeals overturned the decision of the trial court and determined that the Last Will of Arnold E. Mortimore was the product of undue influence.

The Court of Appeals determined that a presumption of undue influence had arisen, and that Helen Fiser had not produced sufficient evidence at trial to rebut the presumption of undue influence. Citing to *Kar v Hogan*, 399 Mich 529, 542; 251 NW2d 77 (1976) for the proposition that “[i]f the trier of fact finds the evidence by the defendant as rebuttal to be equally opposed by the presumption, the defendant has failed to discharge his duty of producing sufficient rebuttal evidence and the ‘mandatory inference’ remains unscathed,” the Court of Appeals held:

The trial court’s statements recognize that Helen presented evidence to rebut the presumption of undue influence but when weighed against opposing evidence in favor of the presumption, the trial court essentially found the evidence equally convincing. As such, Helen did not overcome her duty to rebut the presumption.

(18a)

## \*6 ARGUMENT

The doctrine of undue influence has been described as “one of the most bothersome concepts in all the law.” Dukeminier, Sitkoff, and Lindgren, *Wills, Trusts, and Estates* (New York: Aspen Law & Business, 2009), p 180. The purpose of the doctrine is to give effect to the testator’s intent. However, numerous commentators have strongly criticized the doctrine for its apparent failure to achieve this effect. See, e.g., Joseph W. deFuria, Jr., *Testamentary Gifts Resulting from Meretricious Relationships: Undue Influence or Natural Beneficence?*, 64 Notre Dame L Rev 200 (1989); Melanie B. Leslie, *The Myth of Testamentary Freedom*, 28 Ariz L Rev 235 (1996). One commentator has gone so far as to call for the doctrine’s outright abolition, in part because it arguably interferes with, rather than protects, testamentary freedom. See Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should Be Abolished*, 58 Kan L Rev 245 (2010). Nevertheless, the doctrine of undue influence continues to exist and evolve in various forms throughout the United States.

This Brief proceeds by first defining “undue influence” and examining the doctrine’s origin and development to develop a historical context for its modern application. Second, the modern doctrine of undue influence in Michigan is examined and the elements necessary to establish a presumption of undue influence are reviewed. Third, the effect of the presumption of undue influence is examined. Fourth, the quantum of evidence necessary to rebut a presumption of undue influence is identified. Finally, this Brief concludes by arguing that this Court has, and should continue to, temper the impact of the presumption of undue influence by adopting the “substantial evidence” standard as the quantum of evidence necessary to rebut the presumption of undue influence.

## \*7 I. THE ORIGIN AND DEVELOPMENT OF THE DOCTRINE OF UNDUE INFLUENCE UNDER MICHIGAN LAW.

**A. A donative transfer is procured by undue influence if the wrongdoer exerted such influence over the donor that it overcame the donor’s free will and caused the donor to make a donative transfer that the donor would not otherwise have made.**

“Undue influence” is defined by case law. To establish undue influence, “it must be shown that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the grantor to act against his inclination and free will.” *Kar v Hogan*, 399 Mich. 529, 537; 251 NW2d 77 (1976). “[T]hat influence, to avoid a will, must be such as prevented testator from doing as he pleased with his property.” *In re Spillette’s Estate*, 352 Mich 12, 18; 88 NW2d 300, 303 (1958). However, not all influence is undue influence:

influences to induce testamentary disposition may be specific and direct without becoming undue as it is not improper to advise, persuade, solicit, importune, entreat, implore, move hopes, fears, or prejudices or to make appeals to vanity, pride, sense of justice, obligations of duty, ties of friendship, affection, or kindred,

sentiment of gratitude or to pity for distress and destitution, although such will would not have been made but for such influence, so long as the testator's choice is his own and not that of another.

*Id.* at 17-18 (emphasis added). This definition is in general accord with the Restatement (Third) of Property (Wills and Other Donative Transfers), which provides that a “donative transfer is procured by undue influence if the wrongdoer exerted such influence over the donor that it overcame the donor's free will and caused the donor to make a donative transfer that the donor would not otherwise have made.” Restatement (Third) of Property (Wills and Other Donative Transfers) § 8.3(b).

This Court has held that the effect of a finding of undue influence is “to prevent probate of a will.” *In re Spillette's Estate* at 17. The Restatement (Third) of Property has adopted a more flexible \*8 position. Under the Restatement, “only the donative transfer that was procured by undue... is invalid... The court may, however, hold the entire will invalid if it determines that complete invalidity would better carry out the testator's intent.” Restatement (Third) of Property (Wills and Other Donative Transfers) § 8.3, Comment d.

**B. The doctrine of undue influence is intended to effectuate the donor's “true” intent and to protect susceptible individuals from improper influence that impels the donor to act against his or her inclination and free will.**

The doctrine of undue influence is a device used by courts to effectuate the donor's “true” intent. Any transfer of property tainted by undue influence is voided and the property is returned to the donor or the donor's estate.

When misapplied, the doctrine of undue influence has the potential to frustrate, rather than the further, the donor's true intent. This is because “[t]he individuals most **vulnerable** to charges of undue influence are often those closest to the donor... There is a natural inclination to make gifts to those who are closest and most helpful to the **elderly** during their later years, including longtime friends and family members. The law might discourage volunteerism if such individuals were subject to lawsuits without a reasonable basis for challenging inter vivos and testamentary gifts.” *David W. Kurch, Balancing Discretion to Give and Undue Influence Concerns*, 38 Est Pin 28 (2011). As this Court has recognized, where such volunteerism is not otherwise forthcoming:

“[e]xperience has demonstrated that the right to make or change wills is the most effective means possessed by old and infirm people to enable them to secure, even from their children at times, the care and service which they require.” *Shepard v Shepard*, 161 Mich 441, 463; 126 NW 640 (1910).

These same concerns were echoed nearly seventy years later in a dissent by Justice Dethmers:

I am unwilling to join in exposing every will, in which one in a fiduciary relationship to the testator was made a beneficiary, to the speculations of a jury as to undue influence when the only evidence in the case is to the contrary. That would impinge too greatly on the right of the testator to determine the objects of his bounty and to \*9 include among them those who were particularly kind or helpful to him. **Devoted children, relatives or trusted friends of the testator would respond at their peril to his requests for business advice or assistance if that would automatically subject his natural desire, expressed in his will, to compensate or reward them, not only to a presumption of invalidity but also to jury guesswork,** in defiance [sic] of the only evidence on the subject which is contra.

*In re Wood's Estate*, 374 Mich 278, 298-99; 132 NW2d 25 (1965) (Dethmers, J., dissenting) (emphasis added).

Thus, two competing interests must be recognized and balanced: (1) allowing donors the freedom to make transfers of property to persons and in amounts of the donor's choosing; and (2) protecting susceptible individuals from improper influence that impels the donor to act against his or her inclination and free will.

### C. The origin of the doctrine of undue influence and the presumption of undue influence.

The testamentary doctrine of undue influence has been a part of English common law for centuries,<sup>3</sup> and the first Michigan case invoking the doctrine was reported over 150 years ago. In *White v Bailey*, 10 Mich 155; 1862 WL 2478 (1862), the proponent of the decedent's will was "not related to him by blood or marriage." 1862 WL at \*1. The testator was an elderly man in bad health. *Id.* He had lived with one of his daughters, but a few months prior to his death had gone to live with the proponent, "at whose house the will was made but two or three days before his death." *Id.* The will disinherited the testator's children and instead left everything to the proponent of the will. *Id.* This Court commented that these facts seemed to suggest undue influence.<sup>4</sup> However, no \*10 presumption of undue influence arose. This was in accord with the rule at that time that undue influence could not be presumed:

The influence, to vitiate the will, must have been such as to amount to force and coercion, destroying her free agency, and there must be proof that the will was obtained by this coercion, and it must be shown that the circumstances of its execution are inconsistent with any hypothesis **but undue influence, which cannot be presumed, but must be proved**, and in connection with the will and not with other things.

*Bradford v Vinton*, 59 Mich 139,153; 26 NW 401 (1886) (emphasis added).

Nevertheless, in 1897, this Court recognized that a presumption of undue influence could arise if the contestant proved a beneficiary of the will had occupied a "confidential relationship" with the decedent. In *Donovan v Bromely*, 113 Mich 53, 54; 71 NW 523 (1897), the decedent was a single woman and retired school teacher. For some time she had been living with Mr. and Mrs. Donovan. *Id.* Mr. Donovan was her attorney, and had drafted the decedent's will, which named Mrs. Donovan as her residual legatee. *Id.* The trial court gave the jury the following instruction:

Where a person devises his property to one who is acting at the time as his attorney, either in relation to the subject-matter of the making of the will, or generally, during that time, such devise is always carefully examined, and of itself raises a presumption of undue influence. But this is by no means a conclusive presumption, but it is one that may be overcome by evidence.

*Id.* This Court, in affirming the judgment, said "we think the charge, as a whole, correctly indicated to the jury that the burden does rest upon the proponent to overcome the \*11 presumption<sup>5</sup> that arises from the confidential relation." *Id.* at 55. Thus, under *Donovan*, undue influence was presumed when a person: (1) was a beneficiary of the decedent's will; and (2) occupied a confidential relationship with decedent.<sup>6</sup> Despite similar facts, this Court found no presumption of undue influence two years later in *Lamb v Lippincott*, 115 Mich 611,73 NW 887 (1898).

The facts in *Lamb* appeared sufficient to create a presumption of undue influence. The contestant of the will argued that the proponent of the will:

was virtually the guardian of [the decedent], and did all his business for a series of years, and that, as he is the beneficiary under the will, under the circumstances the presumption arises that he influenced [the decedent] to make the will as he did, and it is incumbent upon him to do away with the presumption.

*Id.* at 616. This Court conceded that the proponent had married the decedent's only child, they had lived together for a number of years, and that the proponent had handled the business affairs of the decedent. *Id.* at 617. Nevertheless, this Court did not find that a presumption of undue influence had arisen.

It does not follow from this condition of things that [the proponent] substituted his will for the will of [the decedent]. It will serve, rather, to explain why [the decedent] made [the proponent] the object of his bounty.

*Id.* This Court reached the same result in *Sibley v Morse*, 146 Mich 463; 109 NW 858 (1906), where no undue influence was found despite the fact that the proponent received a benefit under the decedent's will and was found to be the decedent's "confidential adviser."

\*12 *Lamb* and *Donovan* appear to be incongruent. In both cases the proponent of the will: (1) had a "confidential relationship" with the decedent; and (2) benefited from the decedent's will. Nevertheless, a presumption of undue influence was found in *Donovan* but not *Lamb*. This apparent conflict can be reconciled only if the term "confidential relationship" is interpreted as it was initially understood under common law. Historically, the term "confidential relationship" was narrowly defined as encompassing only those relationships traditionally viewed as advisory.

With this understanding, *Lamb* and *Donovan* are reconcilable. In *Donovan*, the effective beneficiary of the decedent's will was her attorney. Accordingly, the beneficiary held a confidential relationship with the decedent and a presumption of undue influence arose. Conversely, the beneficiary in *Lamb* was the decedent's son-in-law who had not only handled the decedent's business affairs, but had also cared for him during the twilight of his life. However, since the son-in-law did not occupy a "confidential relationship," no presumption of undue influence arose.

Thus, the presumption of undue influence began modestly, and arose only in the presence of the strongest fiduciary and confidential relationships. However, as the decades passed, the term "confidential relationship" grew to encompass more and more relationships, thereby legitimizing those concerns exposed in *Lamb* and by Justice Dethmers in *Wood*.

## II. MICHIGAN'S CURRENT DOCTRINE OF UNDUE INFLUENCE AND THE ELEMENTS OF THE PRESUMPTION OF UNDUE INFLUENCE.

### A. Michigan's Current Doctrine of Undue Influence.

Michigan's current doctrine of undue influence was established by this Court in *Kar v Hogan*, 399 Mich 529; 251 NW2d 77 (1976):

"To establish undue influence it must be shown that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the grantor to act \*13 against his inclination and free will. Motive, opportunity, or even ability to control, in the absence of affirmative evidence that it was exercised, are not sufficient."

*Kar* at 537.

Although not an expressly recognized element of undue influence under Michigan law, the donor must be susceptible in some way to undue influence. In most cases, this susceptibility comes in the form of advanced age, combined with dependence or failing mental capabilities. The susceptibility of the donor has been identified as a factor in determining whether undue influence occurred under Michigan law. See *Matter of Estate of Mikeska*, 140 Mich App 116; 362 NW2d 906 (1985); *In re Kanable's Estate*, 47 Mich App 299; 209 NW2d 452 (1973). The Restatement (Third) of Property similarly recognizes that the victim of undue influence must be susceptible in some way.

The doctrine of undue influence protects against overreaching by a wrongdoer seeking to take unfair advantage of a donor who is susceptible to such wrongdoing on account of the donor's age, inexperience, dependence, physical or mental weakness, or other factor."

Restatement (Third) of Property (Wills and Other Donative Transfers) § 8.3, Comment e.

The contestant has the initial burden of proving that there was undue influence exerted on the donor, [MCL 700.3407\(1\)\(c\)](#); *In re Livingston 's Estate*, 295 Mich 637; 295 NW 343 (1940); *In re Reed's Estate*, 273 Mich 334, 343; 263 NW 76 (1935). The contestant must prove undue influence by a preponderance of the evidence. "The plaintiff or proponent in the probate court bears the same evidentiary burden as every litigant in a civil case. Litigants must prove their case by a preponderance of the evidence." *In re Estate of Wojan*, 126 Mich App 50, 51; 337 NW2d 308 (1983), citing *Utley v First Congregational Church*, 368 Mich 90, 100; 117 NW2d 141 (1962).

It is fairly rare to find *direct evidence* of undue influence. Simply put, those who engage in undue influence probably take some care to do so outside the view of others. Consequently, the party asserting undue influence must typically rely upon circumstantial evidence rather than direct \*14 evidence of undue influence. However, in practice, available *circumstantial evidence* alone is often insufficient to carry the burden of proof, and the application of a presumption of undue influence must be relied upon by the party alleging undue influence.

Undoubtedly, circumstantial evidence may be relied on by contestants to show undue influence. *In re Loree 's Estate* (1909), 158 Mich. 372, 122 N.W. 623. However, to carry the question to the jury, such circumstantial evidence must be of considerable probative force and, quite clearly, must do more than raise a mere suspicion. *In re Langlois' Estate*, *supra*; *In re Spillette's Estate*, *supra*; *In re Fay's Estate*, *supra*; *In re Williams' Estate*, *supra*.

*In re Estate of Willey*, 9 Mich App 245, 257; 156 NW2d 631 (1967).

Direct evidence of the wrongdoer's conduct and the donor's subservience is rarely available to establish the actual exertion of undue influence. The contestant's case must usually be based on circumstantial evidence, and in certain cases, is aided by a presumption of undue influence.

Restatement (Third) of Property (Wills and Other Donative Transfers) § 8.3, Comment e.

## **B. Michigan's Elements of the Presumption of Undue Influence.**

In *Kar*, *supra*, this Court set forth the requirements to raise the presumption of undue influence under Michigan law.

The presumption of undue influence is brought to life upon the introduction of evidence which would establish (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary or an interest which he represents benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in that transaction.

*Kar* at 537.

### **1. What constitutes a "confidential or fiduciary relationship?"**

This Court has sometimes referred to the relationship that gives rise to a presumption of undue influence simply as a “fiduciary” relationship. However, it does not appear that there is any intent to exclude “confidential” relationships that are not “fiduciary” relationships. This Court has identified four situations in which fiduciary relationships usually arise.

**\*15** Fiduciary relationships -- such as trustee-beneficiary, guardian-ward, agent-principal, and attorney-client -- require the highest duty of care. Fiduciary relationships [usually] arise in one of four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer.

[In re Estate of Karmey, 468 Mich 68, 75, 658 NW2d 796 \(2003\) \(fn 2\).](#)

This Court has also noted that the term “confidential or fiduciary relationship” has a focused view toward relationships of inequality.

Although a broad term, “confidential or fiduciary relationship” has a focused view toward relationships of inequality. This Court recognized in [In re Wood's Estate, 374 Mich. 278, 287, 132 N. W.2d 35 \(1965\)](#), that the concept had its English origins in situations in which dominion may be exercised by one person over another. Quoting 3 Pomeroy, Equity Jurisprudence (5th ed, 1941), § 956a, this Court said a fiduciary relationship exists as fact when “there is confidence reposed on one side, and the resulting superiority and influence on the other.” [374 Mich. at 283, 132 N.W.2d 35](#). Common examples this Court has recognized include where a patient makes a will in favor of his physician, a client in favor of his lawyer, or a sick person in favor of a priest or spiritual adviser. [374 Mich. at 285-286, 132 N.W.2d 35](#). In these situations, complete trust has been placed by one party in the hands of another who has the relevant knowledge, resources, power, or moral authority to control the subject matter at issue.

[In re Estate of Karmey, 468 Mich 68, 75, 658 NW2d 796 \(2003\) \(fn 3\).](#)

The Restatement (Third) of Property provides that the term “confidential relationship” embraces three sometimes distinct relationships --- fiduciary, reliant, or dominant subservient. The Restatement provides further insight into the nature of these relationships.

A fiduciary relationship is one in which the confidential relationship arises from a settled category of fiduciary obligation. Some fiduciary relationships are between the donor and a hired professional. For example, an attorney is in a fiduciary relationship with his or her client, an institutional trustee is in a fiduciary relationship with the beneficiaries of the trust, and an institutional guardian or conservator is in a fiduciary relationship with his or her ward or protected person. Other fiduciary relationships are not necessarily between the donor and a hired professional. For example, an agent under a power of attorney is in a fiduciary relationship with his or her principal, but **\*16** the donor's agent under a power of attorney frequently is a close family member or trusted friend who receives no fee for acting as agent. So also an individual trustee, guardian, or conservator might be a close family member or a trusted friend who might not receive a fee for acting in that capacity.

Whether a reliant relationship exists is a question of fact. The contestant must establish that there was a relationship based on special trust and confidence, for example, that the donor was accustomed to be guided by the judgment or advice of the alleged wrongdoer or was justified in placing confidence in the belief that the alleged wrongdoer would act in the interest of the donor. Examples might include the relationship between a financial adviser and customer or between a doctor and patient.

Whether a dominant-subservient relationship exists is a question of fact. The contestant must establish that the donor was subservient to the alleged wrongdoer's dominant influence. Such a relationship might exist between a hired caregiver and an ill or feeble donor or between an adult child and an ill or feeble parent.

In a particular case, these three relationships might overlap. That is, the alleged wrongdoer might be in a fiduciary, reliant, and dominant-subservient relationship with the donor. In another case, however, the relationships might not overlap. For example, an ill or feeble donor might be suspicious of the motives of a hired caregiver, but still be in a subservient relationship with that person, feeling that “I must do what he or she says.”

Restatement (Third) of Property (Wills and Other Donative Transfers) § 8.3, Comment g.

## 2. What constitutes “benefit” from the donative transfer?

In most cases, the fiduciary's benefit from the donative transfer is direct and obvious because the fiduciary has directly received property through a devise, bequest, deed, beneficiary designation, or by operation of law as a surviving joint owner. However, the benefit requirement is also met if an interest represented by the fiduciary benefits from the donative transfer. See *In re Cox' Estate*, 383 Mich 108; 174 NW2d 558 (1970) (testator left residue of estate to church to which attorney who drafted will belonged; attorney and minister of church stood in confidential relationship to testator).

### \*17 3. What constitutes “opportunity” to influence the donor?

This Court has not provided an analysis of what constitutes “opportunity” to influence the donor in the context of the requirements to establish a presumption of undue influence. In two unpublished Court of Appeals decisions, “opportunity” was generally interpreted literally in determining whether the alleged wrongdoer had an opportunity to influence the donor in the donative transfer.

Furthermore, we find that a question of fact exists regarding whether respondent had the opportunity to influence the decedent's decision to execute the contested will. Random House Webster's College Dictionary (1997) defines “opportunity” as “a situation or condition favorable for attainment of a goal.” The parties presented conflicting evidence regarding whether respondent was living with the decedent when she executed her will. Pauline Sheeley, the decedent's sister, claimed that respondent began living with the decedent in May 2000. Petitioner also presented a bank statement indicating that respondent listed the decedent's address as his mailing address as early as May 2000. Although respondent claimed in his deposition that he and his wife did not move from Delaware to the decedent's Michigan home until a few weeks after the decedent executed the will, respondent also stated in his deposition that he was staying with the decedent when she executed the contested will, and he brought the decedent to the attorney's office on the day the decedent signed the contested will. A reasonable fact finder, considering this evidence in a light most favorable to petitioner, could conclude that respondent was in a favorable situation to influence the decedent to execute a will benefiting him and, consequently, that he had the opportunity to influence the decedent to execute the contested will.

*In re Estate of Mayes*, 2006 WL 2380970 (unpublished decision).

“Opportunity” is commonly defined as “a situation or condition favorable for attainment of a goal.” Random House Webster's College Dictionary (1992). We find that the evidence presented below was sufficient to show a condition or situation favorable to the potential for influence by petitioner. Indeed, an appearance filed with the probate court during the guardianship proceedings indicates that the attorney who drafted the will at issue, Stephen Fox, also represented petitioner in his bid for appointment as both testator's guardian and conservator. These petitions the record suggests were actively opposed by the testator and remained pending at the time the will was both drafted and signed. Record evidence further indicates that petitioner was present at the time the will was signed. Although circumstantial in nature, Fox's adverse representation of petitioner at the time the will was drafted, when viewed in connection with evidence indicating that petitioner was present when the will was \*18 signed, was sufficient to show the requisite opportunity for petitioner to exert influence over the testator with respect to that transaction. Id.; see also *Daane v. Lovell*, 83 Mich.App 282, 290; 268 NW2d 377 (1978) (“the factors giving rise to the presumption [of undue influence] are circumstantial evidence that undue influence occurred”); *In re Cox Estate*, 383 Mich. 108, 113-117; 174

NW2d 558 (1970) (finding that the evidence supported a presumption of undue influence when an **elderly** testator's will leaving a sizeable gift to her church was drafted by an attorney also belonging to the church, a rector of which stood in a confidential relationship with the testator). Because the evidence presented below was sufficient to meet the requirements for establishing a presumption of undue influence in the execution of the contested will, against which petitioner offered no contrary evidence, the trial court erred in granting summary disposition in favor of petitioner and dismissing respondents' claim that the will was the product of undue influence. Peterson, *supra*; Mikeska, *supra*.

*In re Estate of Lawler*, 2005 WL 3536417 (unpublished decision).

#### **4. It is relatively easy to establish the presumption of undue influence under Michigan law.**

Establishing the presumption of undue influence under Michigan law almost always depends entirely on the introduction of evidence of a confidential or fiduciary relationship between the donor and the alleged wrongdoer. The issue of undue influence simply would not come up unless the alleged wrongdoer (or someone affiliated with the alleged wrongdoer) benefited from the transaction. The alleged wrongdoer almost always had some interaction with the donor, and therefore had some “opportunity” to influence the donor.

Michigan's requirements for establishing the presumption of undue influence differ significantly from the requirements under the Restatement (Third) of Property. Moreover, Michigan's requirements are arguably easier to satisfy, and therefore result in more applications of the presumption of undue influence. Under the Restatement, a presumption of undue influence arises if: (1) the alleged wrongdoer was in a “confidential relationship” with the donor; and (2) there were “suspicious circumstances” surrounding the preparation, \*19 formulation, or execution of the donative transfer, whether the transfer was by gift, trust, will, will substitute, or a donative transfer of any other type.

The Restatement of Property identifies eight factors to be considered in evaluating whether suspicious circumstances are present in the transfer.

In evaluating whether suspicious circumstances are present, all relevant factors may be considered, including: (1) the extent to which the donor was in a weakened condition, physically, mentally, or both, and therefore susceptible to undue influence; (2) the extent to which the alleged wrongdoer participated in the preparation or procurement of the will or will substitute; (3) whether the donor received independent advice from an attorney or from other competent and disinterested advisors in preparing the will or will substitute; (4) whether the will or will substitute was pre-pared in secrecy or in haste; (5) whether the donor's attitude toward others had changed by reason of his or her relationship with the alleged wrongdoer; (6) whether there is a decided discrepancy between a new and previous wills or will substitutes of the donor; (7) whether there was a continuity of purpose running through former wills or will substitutes indicating a settled intent in the disposition of his or her property; and (8) whether the disposition of the property is such that a reasonable person would regard it as unnatural, unjust, or unfair, for example, whether the disposition abruptly and without apparent reason disinherited a faithful and deserving family member.

Restatement (Third) of Property (Wills and Other Donative Transfers) § 8.3, Comment h.

### **III. THE EFFECT OF THE PRESUMPTION OF UNDUE INFLUENCE IS TO SHIFT TO THE PROPONENT THE BURDEN OF GOING FORWARD WITH THE EVIDENCE.**

This Court has described presumptions as “crystallized inferences of facts. Experience has taught that if certain evidentiary facts be established, there is such a strong practical likelihood that another stated fact will be true that fact may be presumed.”

*In re Wood's Estate*, 374 Mich. 275, 288-89; 32 NW2d 35 (1965). The development of a presumption in undue influence cases most likely derives from the fact that direct evidence of undue influence is rarely available and circumstantial evidence is often insufficient to prove undue influence. By attributing weight and consequence to the factors used to establish the presumption of undue influence, the courts compel \*20 the proponent to come forward with evidence supporting the validity of the transfer. See Neil S. Hecht and William M. Pinzler, *Rebutting Presumptions: Order Out of Chaos*, 58 B.U.L. Rev 527 (1978).

The “burden of proof” is comprised of two elements: (1) the burden of persuasion and (2) the burden of production. Prior to *Widmayer v Leonard*, 422 Mich 280; 373 NW2d 538 (1985), this Court employed the “Morgan” theory of presumptions, under which the burden of persuasion shifts to the party opposing the presumption once the presumption is established. *In re Wood Estate*, 374 Mich 278; 132 NW2d 35 (1965). In *Widmayer*, this Court overturned *Wood* and adopted the “Thayer” theory of presumptions, under which the establishment of the presumption does *not* shift the burden of persuasion (proof) but does shift the burden of going forward with the evidence. The Thayer theory of presumptions is also known as the “bursting bubble” theory of presumptions because once the presumption acts to shift the burden of going forward with the evidence to the other party, the other party may dissipate or “burst” the presumption by submitting sufficient evidence to the fact finder.

Thus, under current Michigan law, after the presumption of undue influence is established by the contestant, if the proponent fails to submit sufficient rebuttal evidence, the presumption stands and is determinative on the issue of undue influence. Conversely, if the proponent submits sufficient rebuttal evidence, the presumption of undue influence is destroyed. In this event, the presumption disappears entirely, and the presumption's very existence would never be disclosed to a jury. Nevertheless, the basic facts that gave rise to the presumption remain as evidence even after the presumption is dissipated.

#### **\*21 IV. THE QUANTUM OF EVIDENCE NECESSARY TO REBUT A PRESUMPTION OF UNDUE INFLUENCE IS “SUBSTANTIAL EVIDENCE.”**

In *Widmayer*, this Court recognized the confusion that followed the adoption of [Michigan Rule of Evidence 301](#) in 1978. This Court ruled that with the adoption of [Michigan Rule of Evidence 301](#), Michigan had returned to a Thayer theory of presumptions.

Thus, to clarify this confusing area of the law, this Court takes the opportunity today to hold that insofar as *Wood* appears to hold that the trier of fact must be instructed as to the existence of the presumption and allowed to make the necessary inference (even in the face of rebutting evidence), it is no longer controlling precedent. We are persuaded that instructions should be phrased entirely in terms of underlying facts and burden of proof. That is, if the jury finds a basic fact, they must also find the presumed fact unless persuaded by the evidence that its nonexistence is more probable than its existence.

*Widmayer*, at 288-89.

Having returned to the Thayer theory of presumptions, this Court clarified the quantum of evidence necessary to rebut a presumption under the now applicable Thayer theory. This Court declared that “substantial evidence” was the quantum of evidence necessary to rebut a presumption of evidence under Michigan law.

Prior to *Wood*, Michigan had adhered to the “Thayer” bursting bubble theory of presumptions. This theory held, in substance, that a presumption was a procedural device which regulates the burden of going forward with the evidence and is dissipated when **substantial evidence** is submitted by the opponents to the presumption.

*Id.* at 286. In the instant case, *Widmayer* was not cited in the briefs of the parties in the Court of Appeals, nor was it cited in the decision of the Court of Appeals. This Court should consider the possibility that this controlling precedent may have been missed by the Court of Appeals in its decision.

Commentators have recognized the need to provide some guidance in the meaning of the term “substantial evidence.” See Neil S. Hecht and William M. Pinzler, *Rebutting Presumptions: \*22 Order Out of Chaos*, 58 B.U.L. Rev 527, 534 (1978). Following *Widmayer*, the Court of Appeals had the opportunity to confirm the meaning of “substantial evidence” under Michigan law. In *Jozwiak v Northern Michigan Hospitals, Inc*, 231 Mich App 230; 586 NW2d 90 (1998), the Court of Appeals held that “substantial evidence” consists of “more than a mere scintilla of evidence but may amount to substantially less than a preponderance.”

[I]t is clear that, under the “Thayer bursting bubble” theory of presumptions, which theory is embodied in MRE 301, substantial evidence is required. *Widmayer v. Leonard*, 422 Mich. 280, 286, 373 N.W.2d 538 (1985). **Michigan courts have repeatedly held that substantial evidence consists of more than a mere scintilla of evidence but may amount to substantially less than a preponderance.** See, e.g., *In re Payne*, 444 Mich. 679, 692, 514 N.W.2d 121 (1994); *Tompkins v. Dep't of Social Services*, 97 Mich.App. 218, 222, 293 N.W.2d 771 (1980). While that definition was developed in a different context, judicial review of administrative agency decisions, we cannot discern any basis for applying a different standard for determining whether substantial evidence has been submitted to rebut a presumed fact.

*Jozwiak*, at 238 (emphasis added).

Based upon the authorities cited above, it is clear under Michigan law that the quantum of evidence necessary to rebut a presumption of undue influence is “substantial evidence” and that “substantial evidence” is something less than a preponderance of evidence. Consequently, the Court of Appeals erred in determining that Helen Fiser did not submit sufficient evidence to rebut the presumption of undue influence. Even under its mischaracterization of the factual findings of the trial court, the Court of Appeals recognized that Helen Fiser produced evidence that was at least “equally convincing” that Decedent's will was not the product of undue influence. “Equally convincing” evidence certainly satisfies the “substantial evidence” required for Helen Fiser, as the proponent of Decedent's will, to rebut the presumption of undue influence.

Further, as a matter of public policy, “substantial evidence” is the appropriate quantum of evidence to require to rebut a presumption of undue influence. Under current Michigan law, it is \*23 relatively easy to establish a presumption of undue influence. The key factor to establish is the existence of a confidential or fiduciary relationship. Such a relationship exists as a matter of law between an agent under a durable power of attorney and the principal. *In re Susser Estate*, 254 Mich App 232, 236; 657 NW2d 147 (2002); *In re Estate of Mayes*, 2006 WL 2380970 (unpublished decision). Such a relationship also arguably exists between an **elderly** individual and someone providing care services, assistance with the payment of bills, or merely regular companionship. However, as pointed out by Justice Dethmers in his dissent in *Wood*, these are the very types of individuals (close and helpful) that the donor is mostly likely to recognize in a will or trust.

If Michigan law required a preponderance of evidence to rebut a presumption of undue influence, rather than the lesser quantum of substantial evidence, in many instances a donor's intent would be inappropriately frustrated by the imposition of a significant burden on the intended recipient of a devise or bequest merely because the recipient was in a confidential or fiduciary relationship with the donor. It is inherently difficult to prove a negative. To require a donee to disprove undue influence by a preponderance of the evidence would be a move too far away from the important policy of allowing donors the freedom to make transfers to persons of the donor's choosing.

## CONCLUSION

Under Michigan law, the quantum of evidence necessary to rebut a presumption of undue influence is “substantial evidence,” which is something less than a preponderance of evidence. The Court of Appeals incorrectly determined that Helen Fiser, as the proponent of Decedent's will, could only rebut the presumption of undue influence by disproving undue influence

by a preponderance of the evidence and that her submission of “equally convincing” evidence was insufficient to rebut the presumption of undue influence.

\*24 To let the view of the Court of Appeals in this matter stand would be a substantial threat to the testamentary freedom of Michigan citizens. Pairing an “easy” standard for the establishment of a presumption of undue influence with a “hard” standard for rebutting a presumption of undue influence will undoubtedly lead to the frustration of the true intent of many donors in Michigan. If this Court wishes to significantly reevaluate Michigan's presumption of undue influence, it would do well to begin by examining the “suspicious circumstances” approach taken under the Restatement (Third) of Property and the eight factors to be considered in evaluating whether “suspicious circumstances” are present in the donative transfer.

This Court should recognize its prior holdings and determine that the quantum of evidence necessary to rebut a presumption of undue influence is substantial evidence (more than a scintilla but less than a preponderance). Accordingly, Helen Fiser asks this Court to reverse the decision of the Court of Appeals and reinstate the decision of the trial court in this matter.

#### Footnotes

- 1 Robert Mortimore died in December 2008.
- 2 At trial, Petitioners-Appellees disputed the validity of the marriage. In its decision, the trial court determined that the issue was moot and made no findings of fact regarding the validity of the marriage.
- 3 See *Mary J. Quinn, Undue Influence: Definitions and Applications*, (March 2010), at 3 (referencing a will contest heard by Sir Francis Bacon as the Lord Chancellor of England in 1617), available at <http://www.courts.ca.gov/documents/UndueInfluence.pdf>
- 4 The court remarked that, taken together, these facts:  
would, and unexplained should, have more or less influence with the jury. The following questions or others of a like character would most likely be found suggesting themselves to the mind: Why did the testator disinherit his children? Why did he leave his daughter's house and go to live with the appellee but a short time before his death? Why did he put off the making of his will until a day or two before he died? Were these acts his-- the offspring of his own free volition? Or were they the production of artifice and cunning, practiced on an old man by some one behind the curtain? And, if we are to judge of the tree by its fruit, who, as the event has shown, had a deeper interest in the fruit the tree has borne than the appellee?  
*Id.*
- 5 One way to “overcome the presumption” was to show the will was made “after receiving independent legal advice.” *Donovan*, 113 Mich at 54.
- 6 As discussed *infra*, modernly a presumption of undue influence also requires proof of the beneficiary having had an “opportunity” to exercise undue influence in addition to proving both these basic facts. While this “opportunity” requirement was not expressly stated in *Donovan*, it was clearly present as the decedent had lived with the beneficiary, and (2) the beneficiary's husband had drafted the will.